Supreme Court, U.S.
FILED
04-598 NOV 1 - 2004
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

FRANK P. FOGERTY
AND NATHAN CROW, PETITIONERS

v.

MGM GROUP HOLDINGS CORP., INC., D/B/A
MGM UNIVERSAL MUSIC GROUP, INC., UNIVERSAL
STUDIOS, INC., AND EON PRODUCTIONS, LTD.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ADAM SIEGLER
SIEGLER LAW GROUP
9454 Wilshire Blvd
Suite M16
Beverly Hills, CA 90212
(310) 777-1111

W. GARY BLACKBURN
Counsel of Record
BLACKBURN AND MCCUNE
201 Fourth Avenue North
Suite 1700
Nashville, TN 37219
(615) 254-7770

Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

I. Whether the Sixth Circuit should be permitted to make new copyright law, by impermissibly shifting to plaintiff the defendant's burden of proving the affirmative defense of prior independent creation, where defendant failed or refused to produce the original recording of the infringing song which constituted the alleged prior independent creation, in a case where:

A. Plaintiffs (Petitioners here), alleged that their song was copied by defendant (Respondent) into the theme song for the James Bond movie *"The World Is Not Enough;"*

B. It is admitted that Petitioners hold a valid copyright;

C. It is conceded that Respondent actually received a demo recording of Petitioners' song;

D. It is admitted the Petitioners' song and Respondent's song contain an identical four note theme and are therefore substantially similar within the meaning of the copyright law; and

E. The only issue is whether Respondent's infringing work was completed before receipt of Petitioners' admittedly similar song.

In such circumstances, and under the longstanding rule established by this Court in *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), can a circuit court uphold the grant of summary judgment against Petitioners, where the Respondent, as moving party on summary judgment, fails or refuses to produce the actual embodiment of the allegedly prior work, which would prove what was created and when it was created?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 19

APPENDIX

CIRCUIT COURT ORDER (08/03/04) 1a

DISTRICT COURT ORDER (03/13/03) 22a

DISTRICT COURT MEMORANDUM (03/13/03) 23a

TABLE OF AUTHORITIES

Page

CASES

ANDERSON V. LIBERTY LOBBY, INC., 477 U.S. 242, 248-49, 106 S. CT. 2505, 91 L. ED. 2D 202 (1986) 9

BAXTER V. PALMIGIANO, 425 U.S. 308, 318, 96 S. CT. 1551, 47 L. ED. 2D 810 (1976) 9

COLES V. WONDER, 283 F.3D 798 (6TH CIR. 2002) 12

DOE V. GORDON JOHNSON, 52 F.3D 1448 (7TH CIR. 1995) 9

FOGERTY V. MGM GROUP HOLDINGS CORP., INC., 379 F.3D 348, 352 (6TH CIR. 2004) ..... *passim*

KNOOR-BREMSE SYSTEME FUER NUTZFAHRZEUGE GMBH V. DANA CORP., 383 F.3D 1337 (FED. CIR. 2004) 9

MATSUSHITA ELEC. INDUS. CO., LTD V. ZENITH RADIO CORP., 475 U.S. 574, 587, 106 S. CT. 1348, 89 L. ED. 2D 538 (1986) ii

NATION-WIDE CHECK CORP., INC. V. FOREST HILLS DISTRIB, INC., 692 F.2D 214 (1ST CIR. 1982) 9

NEWTON V. DIAMOND, 349 F.3D 591, 598-99 (9TH CIR. 2003) 4

NORFOLK & W. RY. V. TRANSPORTATION COMM. INT'L UNION, 17 F.3D 696, 702 (4TH CIR. 1994) 9

SALAZAR V. WESTINGHOUSE ELECTRIC CORPORATION, 914 F.2D 258 (6TH CIR. 1990) 9

WRENCH LLC v. TACO BELL CORP., 256 F.3D 446, 459-60 (6TH CIR. 2001), CERT. DENIED, 534 U.S. 1114 (2002) 8

MISCELLANEOUS

28 U.S.C. § 1254(1) 1

Article I Section 8 U.S. Constitution 1

OPINIONS BELOW

The published opinion of the Sixth Circuit of Appeals from which Petitioners Frank Fogerty and Nathan Crow seek review was issued on August 3, 2004, and published as *Fogerty v. MGM Group Holdings Corp., Inc.*, 379 F.3d 348, 352 (6th Cir. 2004) (attached hereto at Appendix (App. 1a). On March 13, 2004, the District Court entered a non-published Opinion and Order granting Defendants' Motion for Summary Judgment (attached hereto at App. 22a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article 1, Section 8 of the United States Constitution states:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]

STATEMENT OF THE CASE

Petitioners Frank Fogerty and Nathan Crow brought this copyright infringement case because Respondent MGM and its hired composer copied Petitioners' music and used it as part of the theme song for the James Bond thriller *"The World Is Not Enough."* Respondent MGM[1] admits receiving a copy of Petitioners' song, but claims that it had finished its own song a few weeks before it received Petitioners' work. Amazingly, however, MGM did not produce the original demo recording which supposedly embodied this prior independent creation. In spite of Respondent's admitted failure to produce the single most critical piece of evidence in the case, the District Court granted summary judgment and the Sixth Circuit affirmed in a published opinion, thereby creating a new and, it is submitted, a wholly unsupportable precedent for all copyright cases in which the defense of prior independent creation is asserted.

In 1998, Petitioners wrote the music and lyrics of an original song entitled *"This Game We Play."* Petitioners hold a registered copyright to this work, the validity of which is admitted by Respondent and acknowledged by all courts below: "MGM does not dispute that Fogerty and Crow own a valid copyright . . . ." *Fogerty*, 379 F.3d at 352.

Petitioner Crow personally delivered Petitioners' demo recording to MGM on February 4, 1999. Specifically, Crow submitted it to Michael

---

[1] Respondents are collectively referred to as MGM or Respondent.

Sandoval, the MGM executive who was in charge of all film music and who was actively involved in choosing the music for the new James Bond movie, "*The World Is Not Enough.*" Mr. Sandoval said he liked Petitioners' song and kept the demo. *Fogerty*, 379 F.3d at 351.

In addition, Crow gave a demo to Derek Alpert, an executive at Rondor Records, which regularly submitted songs to MGM and whose affiliated company actually "signed" the band which recorded MGM's infringing work. Crow also sent the demo directly by Federal Express to Pinewood Studios, where MGM's hired composer worked. (R. 67, Crow Deposition, p. 125).[2] Thus, MGM had access to Petitioners' work by three independent avenues. Although MGM expressed approval of Petitioners' work upon receipt, MGM did not offer Petitioners a contract or request permission to use their song.

Some months later, however, when MGM released the James Bond movie, "*The World Is Not Enough,*" Petitioners were surprised to hear their own music in the film's theme song, which was also entitled "*The World Is Not Enough.*"

The infringing song, created for MGM as a work for hire by British composer David Arnold, is unquestionably similar to Petitioners' song, "*This Game We Play.*" Indeed, the distinctive four note "hook" is musically identical. This similarity is

---

[2] "R. __" refers to the docket number in the United States District Court for the Middle District of Tennessee.

admitted by Respondent, admitted by MGM's composer in deposition, acknowledged by the District Court, and acknowledged by the Sixth Circuit Panel as well. As the Panel put it: "Arnold's 'The World is Not Enough,' it turns out, shares an ***identical four-note sequence*** with Crow's 'This Game We Play.'" *Fogerty*, 379 F.3d at 351 (emphasis added).[3]

Since Petitioners hold a valid copyright, since the two works are admittedly similar, and since MGM admittedly received a copy of Petitioners' song, the only defense offered by MGM was that it happened to have finished its own song a few weeks before receipt of Petitioners' demo.

Remarkably, MGM claims that it received David Arnold's song demo on the exact same day that Crow submitted Petitioners' song: February 4, 1999. The Panel noted that the striking coincidence of the dates was indeed remarkable, stating that Petitioner "learned – quite remarkably – that Crow delivered his song to an MGM executive (Sandoval) on the same day

---

[3] A distinctive four note sequence is sufficient to prove similarity. Beethoven's famous Fifth Symphony can be evoked with just the first four notes. *See Newton v. Diamond*, 349 F.3d 591, 598-99 (9th Cir. 2003) (Graber, S., dissenting) ("The opening melody of Beethoven's Fifth Symphony is relatively simple and features only four notes, but is certainly is compositionally distinctive and recognizable."); *EMI Catalogue Partnership v. Hill, Holliday, Connors, Cosmopulos Inc.*, 2000 U.S. App. LEXIS 30761, *2 (2d Cir. 2000) ("For those familiar with the Benny Goodman version of it with its upbeat syncopation and counterpoint, 'Sing, Sing, Sing' is as distinctive and recognizable as the opening four notes of Beethoven's Fifth Symphony are to a classical music lover.")

that Arnold delivered his song to Sandoval . . . ." *Fogerty*, 379 F.3d at 357 (offset emphasis in original). The odds of two different composers, working thousands of miles apart, independently coming up with the "identical four-note sequence" and submitting that identical musical theme to the identical executive at MGM for use in the identical movie on the identical day are, to put it mildly, remarkable.

On that identical day, February 4, 1999, when MGM received Petitioners' song, the executives liked Petitioners' song, but did not like Arnold's song. *See Fogerty*, 379 F.3d at 354. Petitioners believe, quite reasonably, that Arnold modified his song after February 4, to include the "identical four note sequence" that is the hallmark of Petitioners' song. In other words, although Arnold may have created ***a*** song prior to February 4, it was not ***the*** song that was ultimately adopted for the movie. Instead, Arnold and MGM incorporated into their existing song the copyrighted "hook" of Petitioners' song after Sandoval received the demo from Crow on February 4.

Obviously, the entire case turns on what was contained in the original recording made by MGM's composer before February 4, 1999 – but MGM never produced that recording in discovery or as part of its summary judgment motion. The refusal to produce the demo is all the more remarkable because the demo did not consist of a tape or CD, which could have been misplaced, but rather consisted of an electronic computer file maintained on the computer belonging to MGM's hired professional musician. Worse than that, MGM asserted that the computer records showed that MGM's demo was last modified on January 6, 1999 – but

this modification could not have been shown on the computer unless the original computer file itself were still on the computer.

Any reasonable juror could have come to the conclusion that MGM created its song in January, modified the song on or after February 4 when it received Petitioners' demo, and then refused to produce the original demo because that would have proved Petitioners' case.

No juror got the chance to reach this conclusion, however, because the district court granted summary judgment, and awarded attorneys' fees against Petitioners. *See* District Court Memorandum and Order Granting Summary Judgment (attached hereto as Appendix, Exh. 2).

The Panel did graciously reverse the award of attorneys' fees. In doing so, however, the Panel cited at length all of the factual reasons which now also compel the reversal of summary judgment:

> As discovery progressed, other facts surfaced that legitimately prompted plaintiffs to pursue their claim. They obtained an expert opinion that the two songs were substantially similar; they learned – quite remarkably – that Crow delivered his song to an MGM executive (Sandoval) on the same day that Arnold delivered his song to Sandoval; they learned that Arnold could not produce a demo of the January 6, 1999 version of the song; and they learned of inconsistencies

> in Manson's and Arnold's recollections of when Manson first heard "The World is Not Enough" and communicated her comments to Arnold. All told, this evidence gave plaintiffs objectively legitimate reasons for pursuing discovery in the case and for seeing the case through to summary judgment.

Fogerty, 379 F.3d at 357.

The Panel is correct: these were legitimate reasons for Petitioners to engage in discovery and to oppose summary judgment. Moreover, since the burden was on MGM to produce the demo and explain the inconsistences in its own statements and documents, these same reasons compel reversal of the summary judgment.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully submit that the Petition should be granted because the Sixth Circuit Panel has, perhaps unintentionally, created a new published precedent, which in effect permits any alleged infringer to state that he created his work first, and to obtain summary judgment ***even without producing the evidence of prior independent creation***, and even in the face of contradictory documents and statements by the infringer's own witnesses.

Petitioners respectfully ask that this Court reverse the Panel's opinion, *per curiam*, so that the opinion will not remain as a published precedent, and so

that Petitioners will have an opportunity to present their case to a jury.

I. Respondent Failed Or Refused To Produce The Demo Constituting The Alleged Prior Independent Creation, Even Though It Had the Burden To Do So.

This entire case turns on MGM's contention that its hired composer created – and finished – its infringing song before February 4, 1999, but the best evidence of that alleged creation, namely the demo itself, has never been produced by MGM. Since MGM had the burden on summary judgment, the burden to prove independent creation, and the burden to produce the evidence upon which it relied, summary judgment should have been denied.

A. The Burden To Produce The Missing Demo Was On MGM, The Defendant And Moving Party On Summary Judgment.

This case is governed by three simple rules:

First, in all copyright cases, the burden is on the defendant to prove the affirmative defense of independent creation, as the Sixth Circuit recently held. *See Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 459-60 (6th Cir. 2001), *cert. denied*, 534 U.S. 1114 (2002) (holding that the testimony of defendant's interested witnesses were insufficient to support summary judgment and that the issue of independent creation presented a genuine issue of material fact).

Second, on summary judgment, the burden is on the defendant as the moving party to demonstrate the absence of a triable issue of fact, as this Court has repeatedly held. *See Matsushita*, 475 U.S. at 587; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Third, the party asserting or relying upon a piece of evidence has the burden of producing it, or the trier of fact can draw an adverse inference from his refusal to produce it. *See* McCormick, Evidence ¶ 373, at 787 (2d. Ed. 1972). Again, the Sixth Circuit endorses this rule. *See Salazar v. Westinghouse Electric Corporation*, 914 F.2d 258 (6th Cir. 1990); *see also Knoor-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004) ("There is precedent for the drawing of adverse inferences . . . for example when a party's refusal to testify or produce evidence in civil suits creates a presumption of an intent to withhold damaging information that is material to the litigation *Doe v. Gordon Johnson*, 52 F.3d 1448 (7th Cir. 1995); *Norfolk & W. Ry. v. Transportation Comm. Int'l Union*, 17 F.3d 696, 702 (4th Cir. 1994) ("The drawing of an adverse inference against a party who fails to come forward with relevant evidence within its control is a reasonable and well-recognized evidentiary rule."); *Nation-wide Check Corp., Inc. v. Forest Hills Distrib, Inc.*, 692 F.2d 214 (1st Cir. 1982). *Cf. Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (confirming that in civil proceedings, fact finders may draw adverse inferences against a party who refuses to testify).

All of these three simple rules operate in favor of Petitioners on summary judgment. Thus, the burden

was and is on the alleged infringer to demonstrate that there is no factual issue as to prior independent creation. On summary judgment, the plaintiff does not have to prove the absence of independent creation; he only has to show that there are triable issues of fact as to prior independent creation.

B. MGM Failed To Meet Its Burden.

MGM manifestly failed to meet its burden under these three rules. The best evidence of prior creation is the actual demo which was allegedly created and modified on or before January 6, 1999. All the parties and all the courts below agree that the MGM demo has never been produced, as the Panel acknowledged:

> Plaintiffs also point to the fact that Arnold never produced the demo recording that he made on January 6, 1999. Arnold testified that his computer at Air Studios showed that he last modified the recording on January 6, 1999, ***but offered no explanation as to why he could not produce a recording.*** According to Fogerty and Crow, "a party having control of information bearing upon the disputed issue may be given the burden of bringing it forward and suffering an adverse inference from [the] failure to do so." Appellant Br. at 21.

Fogerty, 379 F.3d at 356 (emphasis added).

Indeed, the Sixth Circuit Panel found the disappearance of the demo sufficiently troubling to

reverse the attorneys' fee award in favor of MGM. *See Fogerty*, 379 F.3d at 357. The Panel's own logic compels reversal of the summary judgment, because Respondent MGM had the burden on summary judgment, the burden of demonstrating prior independent creation, and, most importantly, the burden of producing the critical evidence in the case.

MGM says its song was not materially changed from the original demo – but where the original demo has mysteriously disappeared, a juror could reasonably infer that MGM and its composer had it concealed or destroyed because it would show that it was created or modified after February 4, 1999. MGM offered several excuses for its refusal to produce the demo, but none of them are credible, and certainly not dispositive on summary judgment.[4]

Significantly, MGM asserted, and the Panel's opinion recites, that the computer records showed that the song was last modified on January 6, 1999. *See Fogerty*, 379 F.3d at 356. It is a matter of common knowledge, however, that if a computer file exists on a computer, such that the date of its last modification can be shown, then the file exists in such a form that it can be produced or printed. Anyone who uses a computer can prove this simple principle in less than 30 seconds, by clicking "*File*" and "*Open*," then selecting any file,

---

[4]For example, MGM claimed that it did not control the evidence. But MGM hired Arnold; in fact MGM hired him several times. MGM owns the copyright to the infringing work. MGM easily obtained declarations and documents from Arnold when it suited its purposes on summary judgment. In short, MGM could have obtained and produced the demo if it had wanted to do so.

and then clicking "*Properties*." Moreover, on summary judgment, Petitioner submitted the declaration of a computer expert, Mr. Robert Strine, supporting Petitioners' position in this regard. (R. 78, Appendix to Plaintiffs' Resp. to SJ, Affidavit of Robert P. Strine, Apx. p. 597).

MGM cannot have it both ways: if it can state, under oath and on summary judgment, that the file was definitely last modified on January 6, 1999, then it could have and should have produced that very same computer file from which that information was derived. MGM's refusal to do so entitles the fact finder to draw an inference against MGM, that, if produced, the missing demo would damage MGM's case. On summary judgment, moreover, the District Court and the Panel were compelled to draw that inference against Respondent MGM and in favor of Petitioners.

In this case, the Panel excused Respondent's failure to produce this critical evidence, even though the Sixth Circuit itself has previously held that the failure to produce the original version of a recording can control the outcome of a copyright case, where the date of creation is the pivotal factor. In *Coles v. Wonder*, 283 F.3d 798 (6th Cir. 2002), the Sixth Circuit dismissed the Plaintiff's copyright infringement claim finding that "plaintiff ... could not refer to the original version of the song when he made the 1990 recording ***because he did not possess a copy of a recording that he made at the time of the song's creation.***" *Coles*, 283 F.3d at 800 (emphasis added).

Thus, the most critical evidence of prior creation is the actual demo which was allegedly created, but

Respondent MGM entirely failed to produce the original demo. Therefore, the trier of fact was entitled to draw an adverse inference that the demo does not exist, or contains evidence that completely undermines MGM's claim of prior creation, or that the demo was altered to disguise its date of creation or modification. On summary judgment, the trial court was required to draw all these inferences in favor of Petitioner, and to deny summary judgment. Instead of reversing the trial court, however, the Sixth Circuit Panel has now issued a published opinion that authorizes summary judgment in favor of an alleged infringer, even where the evidence of prior creation has not been produced.

C. There Are Numerous Other Triable Issues Of Fact Which The Panel Acknowledged But Did Not Resolve In Favor Of Petitioner, As Required by This Court's Holding In *Matsushita*.

The case of the missing demo was not the only triable issue of fact which the Sixth Circuit attempted to shift back onto Petitioners. In fact, there are many other factual inconsistences which preclude the granting of summary judgment.

1. The Trish Hillis Letters Showed That Arnold Was Still Working on His Song After It Was Allegedly "Created."

The letters written by Arnold's assistant, Trish Hillis, give rise to the strong inference that MGM's song was not completed prior to February 4, 1999. On January 7, 1999, after Arnold had finished creating the

MGM song, Ms. Hillis wrote that Arnold "has been commissioned" to write it; significantly she did not say that he had written or even that he had started writing it. On February 16, 1999, after the finished work was allegedly delivered to MGM, she wrote that the "process is already quite far advanced." It was not until April 10, 1999, that she wrote for the first time that Arnold "has already completed the opening and end title songs." In a further letter on April 16, 1999, she wrote that Arnold had completed the work "a few weeks ago" - that is, in March or April, 1999. (R. 78, Appendix to Plaintiffs' Resp. to SJ, Hillis letters 17, Apx. pp. 592-94.)

Any reasonable juror could infer from the ***progression*** of work recited in these letters, that Arnold "had been commissioned" but had not started work in January; that he was "already quite far advanced" in February, but that he did not finish until March or April. Therefore, a juror could infer that Arnold was still working on his song on February 4, when MGM received Petitioners' demo. Instead, the Sixth Circuit reached for inference that Ms. Hillis was referring to the entire soundtrack and not the disputed title song, but again, this was a factual inference that should have been resolved in favor of Petitioner on summary judgment.

2. MGM's Contract With Arnold For The Song Was Dated Well After The Alleged Creation Of MGM's Song.

The Panel also brushed aside the fact that MGM's own contract with Arnold was dated March 12, 1999 - some two months after Arnold had already allegedly completed the song. (R. 78, Appendix to Plaintiffs' Resp. to SJ, Composer contract 6, Apx. p. 490). Similarly, the contract between MGM and Black is dated June 30, 1999. (R. 78, Appendix to Plaintiffs' Resp. to SJ, Lyricist contract 7, Apx. 522).

3. The Statements of MGM's Own Witnesses Were Inconsistent.

The band which ultimately recorded the song for MGM (a well known band called "Garbage") gave numerous conflicting statements about when the band members received the music, when they worked on the lyrics, and when they finished the work. MGM claims that lead singer Shirley Manson received a demo copy of MGM's song on January 20, 1999. Manson later told Crow that she first received the song in August of 1999. (R. 78, Appendix to Plaintiffs' Resp. to SJ, Manson Disclosure 15, p. 9, Apx. p. 551). But Arnold stated in his declaration that he spoke to her by phone on January 21, 1999 and that Manson loved the song. (R. 18, Arnold Dec, ¶ 11, Apx. p. 66; R. 17, First Statement of Undisputed Fact, ¶ 13, Apx. p. 56). However, Manson stated that she had "no idea" whether she heard the song before February 4, 1999. In his deposition, taken after Manson's, Arnold stated that he heard from Manson via e-mail on an unknown

date, and that he subsequently deleted the e-mail – another piece of conveniently missing evidence. (R. 67, Arnold Deposition, p. 91, Apx. p. 244).

Similarly, Mr. Black, declared that "Mr. Arnold and I made a demonstration recording ("Demo Recording") for TWINE in November or December of 1998 in the DAT format." (R. 18, Black Declaration, ¶ 7, Apx. p. 69). But Black had independently told Crow that he first received the song ten months later, just two months prior to the December 1999 release date of the movie. (R. 78, Appendix to Plaintiffs' Resp. to SJ, Black's Disclosure, p.24, Apx. p. 582).

The courts below were required by the holding in *Matsushita* to resolve all of these inconsistences in favor of Petitioners, but they did not do so, even though the Panel acknowledged that such inconsistencies existed: "But the declarations contained several inconsistencies and all of them were submitted by individuals with a personal or professional stake in the answer to whether David Arnold copied a song that he represented as original." *Fogerty*, 379 F.3d at 357.

Since the record fully supports the reversal of summary judgment, this is an appropriate case in which to confirm the rule that the defendant in every copyright case has the burden of proving the affirmative defense of independent creation, and that the defendant cannot allege such prior creation without producing the evidence upon which that defense allegedly rests.

II. The Sixth Circuit's Shifting Of The Burden In Independent Creation Cases Will Have Far-Reaching And Chilling Effects On Writers And Composers In The Entertainment Industry.

In straining to uphold the grant of summary judgment against Petitioners' copyright infringement claim, the Sixth Circuit Panel has in effect created a new and contradictory rule, which completely reverses the burdens of proof to which this Court and the Sixth Circuit itself have long adhered, namely that (1) the burden is on the defendant to prove the affirmative defense of independent creation; (2) on summary judgment, the burden is on the moving party to demonstrate the absence of a triable issue of fact; and (3) the party asserting or relying upon a piece of evidence has the burden of producing it, or the trier of fact can draw an adverse inference from his refusal to produce it. Instead, the Sixth Circuit Panel's new rule permits alleged infringers to obtain summary judgment without ever producing the actual evidence upon which their claim of independent creation is based.

The new rule established by the Sixth Circuit Panel will have the effect of re-writing the law of prior independent creation in the entire entertainment industry. In essence, the Panel's opinion invites infringing studios to refuse to produce the actual evidence of prior independent creation, secure in the knowledge that they can still bring a successful summary judgment motion, because the burden of producing the unproduced evidence has now been shifted to the plaintiff, who manifestly has no ability to produce evidence in the exclusive custody and control

of the defendant.

Shifting the burden of proof in independent creation cases will have a dramatic and chilling effect on writers and composers, who generally have limited resources to disprove a falsely asserted affirmative defense. In this case, Petitioner is a musician with many credits but few resources, while defendant MGM is a multi-billion dollar, global entertainment company. The situation is the same for most entertainment copyright claims, because composers, songwriters and scriptwriters usually have minimal resources, while the major studios which produce the infringing works have armies of lawyers and essentially unlimited litigation budget.

The effect of the Panel's ruling is magnified by the Sixth Circuit's prominence in the entertainment world. Among other things, the Sixth Circuit includes Nashville, one of the most fertile sources of music in the country.[5] There are many songs, musical compositions and scripts which are written every year, in Nashville and throughout the country, but many or most of these are created by writers with few resources. By publishing a decision which rewards a studio for withholding evidence of its alleged prior work, the Panel's decision will have the unfortunate and probably unintended consequence of encouraging large studios to infringe now and litigate later, against writers who are

---

[5]The Second Circuit includes music, television and publishing companies; and the Ninth Circuit includes the large network of entertainment industries colloquially and collectively known as Hollywood.

unlikely to have the litigation resources to overcome this presumption of prior creation that the Panel has now established. Petitioner respectfully submits that all composers and writers should have a fair day in court to put on their case for infringement.

CONCLUSION

It was legally wrong and fundamentally unfair to shift to Petitioners the burden on summary judgment. Petitioners were entitled to the benefit of all three rules which govern summary judgment in copyright cases: (1) the burden on defendant to prove the affirmative defense of prior creation; (2) the burden on the moving party on summary judgment; and (3) the burden, and resulting adverse inference, on a party who relies on particular evidence but who fails or refuses to produce it.

Petitioners respectfully submit the Panel's decision is not consistent with these existing rules, and in effect creates a new and contradictory rule, which permits infringers to obtain summary judgment without producing the actual evidence of prior independent creation, and which encourages copyright infringers to withhold the evidence of their alleged prior creation. Petitioners Frank Fogerty and Nathan Crow, like thousands of similarly situated composers and writers, simply ask that they be given a full and fair opportunity to present their case to the trier of fact. Accordingly, Petitioners respectfully pray that the Petition be granted and the opinion of the Sixth Circuit Panel be reversed.

Respectfully submitted,

W. GARY BLACKBURN
Counsel of Record
BLACKBURN AND MCCUNE
201 Fourth Avenue North
Suite 1700
Nashville, TN 37219
(615) 254-7770
Attorneys for Petitioners

(Any footnotes trail end of each document)

Nos. 03-5498/5874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Frank P. Fogerty and Nathan Crow,
Plaintiffs-Appellants,

v.

MGM Group Holdings Corp., Inc., d/b/a MGM Universal Music Group, Inc., Universal Studios, Inc., and EON Productions, Ltd.,
Defendants-Appellees.

June 9, 2004, Argued
August 3, 2004, Decided
August 3, 2004, Filed

COUNSEL: ARGUED: W. Gary Blackburn, BLACKBURN & McCUNE, Nashville, Tennessee, Adam Siegler, THE SIEGLER LAW GROUP, Beverly Hills, California, for Appellants.

Timothy L. Warnock, BOWEN, RILEY, WARNOCK & JACOBSON, Nashville, Tennessee, for Appellees.

ON BRIEF: W. Gary Blackburn, BLACKBURN & McCUNE, Nashville, Tennessee, Adam Siegler, THE SIEGLER LAW GROUP, Beverly Hills, California, for Appellants.

Timothy L. Warnock, Jay S. Bowen, BOWEN, RILEY, WARNOCK & JACOBSON, Nashville, Tennessee, for Appellees.

JUDGES: Before: MARTIN and SUTTON, Circuit Judges; HOLSCHUH, District Judge.*

OPINION BY: SUTTON

OPINION:

SUTTON, Circuit Judge. Plaintiffs Frank P. Fogerty and Nathan Crow appeal the district court's order granting summary judgment and awarding attorneys' fees to defendants (collectively, "MGM") in this copyright infringement case. As we agree with the district court that plaintiffs have not presented a sustainable theory of relief, we affirm that ruling. As we disagree with the district court's award of attorneys' fees, we reverse that ruling.

I.

Michael Wilson and Barbara Broccoli, the current producers of the James Bond films and principals of Eon Productions, Ltd., sought a composer to write the musical score for the nineteenth Bond film-"The World Is Not Enough." In September 1998, Wilson and Broccoli selected David Arnold, a London-based composer, a Grammy award winner for the musical score for "Independence Day," and the author of the end theme song for the Bond film "Tomorrow Never Dies." Arnold maintains a private recording studio in London, where he composed the theme song and gave it the same name as the film. In writing the song, Arnold

collaborated with lyricist Don Black, who also lives in London and who has written the lyrics to the theme songs for four previous Bond films. Arnold and Black met several times in November and December of 1998 to discuss the lyrics for "The World Is Not Enough," and they exchanged phone calls, faxes and e-mails during that time in collaborating on the song.

Arnold also contacted Shirley Manson, the Scottish-born lead singer for the rock-group "Garbage," and asked her to record the song. She agreed.

Between late October and November of 1998, Arnold played the melody of "The World Is Not Enough" over the phone to his personal assistant Trish Hillis, before whom he often informally auditioned his songs. According to Arnold, he "strung some la-la's together, and all of a sudden the [song] came to life, and [he] thought [that was] probably it." JA 229. On December 26, 1998, Arnold again played "The World Is Not Enough" for Hillis, this time on a piano at his London home. When Arnold played the music for Hillis, he had completed the song and lyrics, save for the bridge-a brief transition of approximately eight bars in the middle of the song. In December 1998, Arnold also played the melody for Geoff Foster and Isabel Griffiths, employees of Air Studios, on a grand piano in the studio's main hall.

In early January 1999, Arnold completed the song and created a "demo" recording of it on his computer at his private recording studio. Arnold's computer shows January 6, 1999 as the last day he modified the demo recording.

At roughly this time, Arnold played "The World Is Not Enough" for Michael Wilson and Barbara Broccoli, the producers of the upcoming film. They liked the song. On January 8, 1999, Arnold traveled to Pinewood Studios in England and played the song for Michael Apted, the director of "The World Is Not Enough," who "was extremely pleased with [the song]." JA 233.

Arnold next asked Trish Hillis to deliver a copy of the demo to Shirley Manson, who (as noted) had agreed to record the song. On January 19, Hillis's phone log shows that she contacted Ian Wesley, the general manager of Mushroom Records, Garbage's record label. Wesley told Hillis that Manson was staying at the Royal Garden Hotel in London and to deliver the recording to the hotel at 10 a.m. the next day. On January 20, after Hillis arrived at the Royal Garden Hotel, she called Harold Kohl, Garbage's tour manager, who told her to leave the recording at the front desk. A bill from the Royal Garden Hotel indicates that Shirley Manson stayed there on January 20, 1999, and Manson later recalled receiving the song from Kohl in January 1999 while staying at the hotel.

Arnold next sent a recording of the song to his American agent, Vas Vangelos, who lives in Los Angeles. An invoice shows that Air Studios billed Eon Productions for a shipment to Vangelos on February 2, 1999. Michael Sandoval, then an executive vice president at MGM, requested a copy of "The World Is Not Enough" from Vangelos. Sandoval received "The World Is Not Enough" on February 4, 1999, and he played the song for other MGM executives. No one apparently liked the song initially because it was a

ballad and because they had hoped for a theme song with a different tempo.

On the same day (February 4, 1999), Nathan Crow visited Michael Sandoval at MGM and delivered a recording of his song "This Game We Play," which he had co-written with Frank P. Fogerty. According to Crow, Sandoval liked the song, suggested that he might consider it for the 1999 film "The Thomas Crown Affair" and kept a copy of the recording. Arnold's "The World Is Not Enough," it turns out, shares an identical four-note sequence with Crow's "This Game We Play."

Before Manson recorded the commercial version of "The World Is Not Enough," MGM contacted Arnold in March of 1999 and suggested that a "three-note motif" in "The World Is Not Enough" was too similar to a motif in earlier Bond theme songs. Arnold agreed to remove the three-note sequence, which all agree is unrelated to the four-note sequence that "This Game We Play" and "The World Is Not Enough" have in common.

In June and August of 1999, Shirley Manson and her band recorded "The World Is Not Enough." Manson requested one lyrical change in the song because the line-"I know when to kiss and I know when to kill"-did not meet her tastes. JA 228. Arnold and Black changed the lyrics, and she completed the recording.

II.

Convinced that Arnold and MGM had copied the four-note sequence from "This Game We Play" in composing "The World Is Not Enough," Fogerty and Crow filed a

copyright infringement action in the United States District Court for the Middle District of Tennessee. The parties conducted discovery, and MGM moved for summary judgment, claiming that the undisputed facts showed that Arnold independently created "The World Is Not Enough."

The district court granted MGM's motion, concluding that Arnold had independently written the tune to the song:

> Defendants and composers of ["The World Is Not Enough"] did not have access to ["This Game We Play"] [through] any of the avenues postulated by Plaintiffs because a review of the record indicates that the melody and significant portions of ["The World Is Not Enough"] . . . were completed prior to the dates that any alleged access by Defendants to ["This Game We Play"] could have occurred.

D. Ct. Op. at 17 (Mar. 14, 2003). The district court also rejected plaintiffs' alternative claim that the two songs are "strikingly similar," an independent theory of liability that warrants relief even when the plaintiff cannot prove access. *Id.* at 19-20. "There is no evidence adduced by Plaintiffs," the court concluded, "to support the proposition that the two works are so strikingly similar that copying is the *only* plausible explanation of the similarities." *Id.* at 20.

In the aftermath of this ruling, MGM moved for attorneys' fees under § 505 of the Copyright Act, 17 U.S.C. § 505, and for nontaxable costs under Federal Rule of Civil Procedure 54(d). Alleging that plaintiffs' claims were "objectively unreasonable," MGM sought $

170,519 in attorneys' fees and $ 11,647.60 in non-taxable costs. The district court granted MGM's motion for attorneys' fees "in the interests of justice and in furtherance of the objectives of the Copyright Act." D. Ct. Op. at 8 (June 17, 2003). "Plaintiffs['] claims were objectively unreasonable," the district court observed, "in that Plaintiffs pursued litigation despite multiple third-party declarations establishing independent creation of ["The World Is Not Enough"] before any of the Defendants had access to Plaintiffs' original work," and "Plaintiffs offered no direct evidence to support one of the two basic elements of copyright infringement." *Id.* at 8-9. The district court, however, "concluded that a 30% reduction in the billed hours . . . is appropriate . . . in light of the overstaffing of this litigation, the redundant billing, and vague entries on the firm's invoices," *id.* at 15, and awarded MGM $ 85,507.16 in attorneys' fees, *id.* at 19. Holding that fees for "(1) legal research; (2) federal express charges; (3) messenger service; (4) phone/telecopy; (5) postage; (6) out of town travel; and (7) copies" were not allowable, the district court denied MGM's request for nontaxable costs of $ 11,647.60. *Id.* at 20. For routine taxable costs, the district court awarded $ 4,847.58. *Id.* at 23.

III.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," the Supreme

Court has held, "there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quotation omitted). A district court's summary-judgment decision receives de novo review. *See* Farhat v. Jopke, 370 F.3d 580, 587 (6th Cir. 2004).

The Copyright Act gives copyright owners exclusive rights to reproduce, prepare derivative works from, distribute, and publicly perform or display a copyrighted work. *See* 17 U.S.C. § 106. To the ends of protecting these rights, the Act allows "the legal or beneficial owner of an exclusive right under a copyright . . . to institute an action for any infringement of that particular right." 17 U.S.C. § 501(b). A claim of copyright infringement requires proof of "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991); *see also* Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999).

Because claimants rarely have direct evidence of copying, they typically try to establish an inference of copying by showing "(1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue." Ellis, 177 F.3d at 506. "Access," we have held, "is essentially hearing or having a reasonable opportunity to hear the plaintiff[s'] work and thus having the opportunity to copy" and "may not be inferred through mere speculation or conjecture." *Id.* (quotations omitted). The "substantial similarity" analysis first requires a filtering of the unprotectable aspects of the protected work, then asks whether an "ordinary observer" would

perceive the original and the alleged copy as substantially similar. *See* Kohus v. Mariol, 328 F.3d 848, 855-57 (6th Cir. 2003). Once a plaintiff establishes access and substantial similarity, the defendant may rebut the presumption of copying by showing independent creation of the allegedly infringing work. Ellis, 177 F.3d at 507; *see also* Susan Wakeen Doll Co. v. Ashton Drake Galleries, 272 F.3d 441, 450 (7th Cir. 2001). Lastly, even without proof of access, a plaintiff still may prevail by showing a "striking similarity [between the works], precluding all possible conclusion but that the work was copied." Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 325 (6th Cir. 2004).

In applying these principles to this case, the parties share considerable common ground. MGM does not dispute that Fogerty and Crow own a valid copyright in "This Game We Play," and plaintiffs concede that they failed to produce direct evidence of copying. For purposes of this appeal, the parties also agree that Fogerty and Crow proved that MGM had access to their work after February 4, 1999, and that the two songs are substantially, but not strikingly, similar.

The question under these circumstances is whether David Arnold independently created "The World Is Not Enough" before February 4, 1999, and whether the undisputed evidence establishes that fact. We believe it does.

Fogerty and Crow concede that David Arnold did not have access to "This Game We Play" until Crow delivered a recording of the song to Michael Sandoval at MGM on February 4, 1999. Before that date,

deposition testimony and personal calendar entries show that David Arnold and Don Black collaborated on "The World Is Not Enough" in November and December 1998. Arnold performed the song twice for his personal assistant Trish Hillis between October and December of 1998. He also performed the song for Geoff Foster and Isabel Griffiths of Air Studios in December 1998, and the film producers Barbara Broccoli and Michael Wilson heard the song in early January 1999. Arnold also made a demo recording of the song, and his personal computer at Air Studios indicates that he last modified the recording on January 6, 1999. The next day, Arnold delivered a copy of the song to Pinewood Studios where the film's director, Michael Apted, listened to the song.

Arnold and Hillis also testified that Hillis delivered a copy of the recording to the Royal Garden Hotel in London where Shirley Manson was staying. Hillis produced her phone log showing that she made several calls concerning the delivery on January 19, 1999, and her personal calendar indicated that she planned to go there on January 20 to deliver Arnold's song. MGM also produced a hotel receipt indicating that Shirley Manson stayed at the Royal Garden Hotel on January 20. Hillis testified in her deposition that she left the recording at the hotel desk for Harold Kohl, Garbage's tour manager, and Manson recalled receiving the recording from Kohl at the hotel.

Aside from a lyrical change to the song (the removal of one line to accommodate Shirley Manson) and one change to the score (the removal of the "three-note motif" to accommodate the MGM executives), the witnesses that testified or gave declarations agree that

the song they heard before February 4, 1999 did not otherwise change after that date. In the face of this evidence that Arnold and Black independently created "The World Is Not Enough" before MGM first had access to "This Game We Play" on February 4, 1999, plaintiffs raise a series of arguments designed to show that they nonetheless should be able to present their claim to a jury. Each is unconvincing.

First, they suggest that they can respond to this evidence simply by claiming that a jury might choose to disregard it or might find it unpersuasive. That is not true. *See* Cox v. Ky. DOT 53 F.3d 146, 150 (6th Cir. 1995) ("[A] nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations . . . . Instead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment."); Curl v. IBM, 517 F.2d 212, 214 (5th Cir. 1975) ("The party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and . . . the opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof.") (quotation omitted); Eaton v. NBC, 972 F. Supp. 1019, 1024 (E.D. Va. 1997) ("[A] copyright plaintiff cannot base her opposition to summary judgment entirely on the hope that a fact finder will disbelieve the persons who have submitted affidavits on issues of access."); *cf.* Matsushita, 475 U.S. at 586 ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than

simply show that there is some metaphysical doubt as to the material facts.") (footnote omitted).

Second, in the absence of affirmative evidence rebutting MGM's pre-access chain of events, plaintiffs claim that inconsistencies in MGM's evidence by themselves create a genuine issue of material fact. They note, for example, that MGM executives disliked "The World Is Not Enough" but liked "This Game We Play" in early February 1999. The different reactions, plaintiffs urge, show that the two songs were not substantially similar on February 4, 1999, and show that Arnold must have copied "This Game We Play" after February 4, 1999 because the songs are substantially similar today. Too many competing inferences, however, separate this premise from plaintiffs' proposed conclusion. Fogerty and Crow neglect to mention that MGM executives listened to each song for different reasons-in Arnold's case to determine if the song would work for the new Bond film, in plaintiffs' case to see if their song would work for *another* film. Because the MGM executives listened to each song in different musical, artistic and commercial contexts-with one solicited for the Bond movie and the other unsolicited and at most considered for another film-this theory of infringement is too speculative to warrant a jury trial on its own.

Fogerty and Crow next scrutinize Arnold's and Black's testimony. Arnold's declaration indicates that he made "an initial demonstration recording" of the "The World Is Not Enough" on January 6, 1999. Black's declaration, however, indicates that he made a recording with Arnold in November or December 1998. Neither version of events, however, places creation of the demo

recording after February 4, 1999. A factfinder could believe Arnold; it could believe Black; or it could believe parts of each individual's testimony. But it could not rationally come to the conclusion that the recording was made after February 4, 1999, especially in light of plaintiffs' inability to refute the delivery of a recording of the song to Manson at the Royal Garden Hotel on January 20, 1999.

Fogerty and Crow point to one other alleged discrepancy between Arnold's and Black's testimony that deserves mention. Posturing as someone working with James Horner, the composer of the "Titanic" sound track, Crow contacted Don Black by phone and asked whether Black would be interested in writing the song lyrics for the film "Oceans 11." During the tape-recorded conversation, Crow asked Black questions about "The World Is Not Enough," including when he received the song to write the lyrics. Black, who later explained that he was trying to impress someone whom he believed to be a major composer, indicated that he received the song approximately two months before the movie's release date, which was December 1999. As Crow admitted (after the phone call), "the entire thing [was] deceptive . . . [and] intentional[]," JA 310, because he was trying "to trick them into telling [him] the truth," JA 311.

The Federal Rules of Civil Procedure do not provide for this form of discovery. And it is not clear whether the Federal Rules of Evidence would permit the admission of such a phone call. But even assuming the admissibility of this evidence and even assuming that Fogerty and Crow would unveil this antic to a jury, the statement at issue-that Black (the lyricist) purportedly

received the music to the song just two months before its release-does not establish a cognizable cause of action. In order to credit this statement, a jury would have to believe that Black wrote the lyrics to "The World Is Not Enough" in October 1999-two months *after* Garbage finished commercially recording the song. No rational trier of fact could rely on this statement in finding for Fogerty and Crow.

Plaintiffs next point to several letters written by Trish Hillis to individuals seeking to collaborate with David Arnold while he composed the musical score for "The World Is Not Enough." The nub of these letters is that Arnold continued working on the musical score for the entire movie after the February 4, 1999 date of access. Absent from the letters, however, is any reference to the theme song, which is all that is at issue here. The most potent letter, dated April 16, 1999, reads: "[Arnold] has also been commissioned to write both [the theme and end] songs, which were finished a few weeks ago." JA 594. At most, however, this statement shows that *both* songs (as opposed to only "The World Is Not Enough") were not complete until after February 4, 1999, which does not create a fact dispute that the theme song had not been completed before that date.

Shirley Manson's testimony also contains several inconsistencies, none of which casts doubt on MGM's claim of independent creation. Manson and Arnold failed to recall consistently the details of when Manson first heard the song and when she and Arnold first communicated after she heard the song. In his declaration, Arnold claimed that he spoke with Manson on the phone January 20, 1999 (the day Hillis delivered the song to the Royal Garden Hotel) and that she loved

the song. In Arnold's deposition, he said that he received an e-mail from Manson on an unknown date. Manson essentially could not recall when she first listened to the demo recording and had "no idea" if she listened to it prior to February 4, 1999. JA 215. But these inconsistencies do not alter the unrefuted evidence that Hillis left a copy of the song for Manson at the Royal Garden Hotel on January 20, 1999, and that it was this copy of the song that Manson eventually heard. In this setting, the district court's decision to disregard the inconsistencies in Manson's other testimony does not amount to an improper weighing of the evidence. *See* Street v. J.C. Bradford & Co., 886 F.2d 1472, 1480 (6th Cir.1989) ("The trial court has at least some discretion [at summary judgment] to determine whether [plaintiffs'] claim is 'implausible.'").

Crow also made a false-pretenses phone call to Shirley Manson, much like the one he made to Don Black. During the call, Manson indicated that she first received the song in August of 1999. While Manson's band did not *finish* commercially recording the song until that date, the parties do not dispute that the first recording session of the song occurred in June 1999. In other words, to believe plaintiffs' interpretation of Manson's statement, a jury would have to conclude that Manson first heard "The World Is Not Enough" two months *after* she began recording the song. No rational jury would accept that sequence of events.

Fogerty and Crow next take aim at the declarations of Wilson and Broccoli. In their declarations, Wilson and Broccoli noted that "aside from some minor lyrical changes, the song David played us in his attic room that day was the same song we ultimately recorded for the

film," but failed to mention that Arnold later removed the "three-note motif" that the initial recording of the music shared with earlier Bond songs. This oversight, according to plaintiffs, makes the declarations unreliable. We are not persuaded. The change was a minor one; it had nothing to do with the four-note sequence that parallels "This Game We Play"; and it does not alter the fact that Arnold played "The World Is Not Enough" for others (including Wilson and Broccoli in early January 1999) well before the date of access.

The dates of the contracts between Arnold, Black and MGM also have little value. True, each written contract went into effect after February 4, 1999. But the undisputed evidence shows that Wilson and Broccoli selected David Arnold to write the musical score for "The World Is Not Enough" in September 1998. And in his own deposition, Crow acknowledges that on February 4, 1999, when he met with Sandoval of MGM, Sandoval told him that Arnold had a "lock on this," JA 299, "that Mr. Arnold had been hired to write an original score for the film," JA 298, and that "Mr. Sandoval made it very clear that Mr. Arnold had been hired to write the score," *id.*

Plaintiffs also point to the fact that Arnold never produced the demo recording that he made on January 6, 1999. Arnold testified that his computer at Air Studios showed that he last modified the recording on January 6, 1999, but offered no explanation as to why he could not produce a recording. According to Fogerty and Crow, "a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse

inference from [the] failure to do so." Appellant Br. at 21. Here, however, MGM is the party, not David Arnold, and it did produce an original copy of the demo recording from Don Black. Plaintiffs do not refute the authenticity of Black's copy of the song, and at all events never explain why they did not seek discovery of Arnold's computer to determine if the January 6th demo could still be retrieved.

Fogerty and Crow, lastly, question the reliability of MGM's declarations based on the "excessive hours spent" in drafting them. Appellant Br. at 22. MGM's attorneys "spent approximately 80 hours drafting and revising these declarations," plaintiffs argue, and "it does not take 80 hours to write a few pages of the truth." *Id.* at 22-23. But this argument does not prove that the affidavits are false or even suggest as much. Whether the scrivener of the affidavits was quite deliberate, was inefficient or merely was confronted with a voluminous record, extensive time in drafting affidavits (or even excessive time in drafting them) does not indicate that they are false.

IV.

Plaintiffs next argue that even if it was appropriate to grant summary judgment, the district court erred in awarding fees to MGM. We agree.

Section 505 of the Copyright Act provides:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this

title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505. Under this provision, a district court may "impose attorney[s'] fees in frivolous and objectively unreasonable lawsuits." Murray Hill Publ'ns, Inc. v. ABC Communications, Inc., 264 F.3d 622, 639 (6th Cir. 2001). A district court's decision to award attorneys' fees should be based on such factors as "[the] frivolousness of the claim," the "motivation" of the claimant, the "reasonableness" of the claim and the goal of "deterring" frivolous claims. Coles v. Wonder, 283 F.3d 798, 804 (6th Cir. 2002). We review a district court's decision to grant or deny fees for an abuse of discretion. ABC Communications, Inc., 264 F.3d at 639.

While plaintiffs' claim ultimately proved meritless, that does not make it "objectively unreasonable" as a matter of law or fact. *See* id. at 639-40 (reversing an award of attorneys' fees under 17 U.S.C. § 505 because "at the time [the] litigation was before the district court, the law on certain relevant aspects of [the] lawsuit was unsettled"); *cf.* Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, L.P., 171 F.3d 52, 58 (1st Cir. 1999) ("The mere fact that a claim ultimately proves unavailing, without more, cannot support the imposition of Rule 11 sanctions."). At the time Fogerty and Crow filed their complaint, they knew only that Crow delivered "This Game We Play" to Michael Sandoval and, ten months later, MGM used a very similar song as the theme song for "The World Is Not Enough." Nowhere does MGM contend that filing a complaint on this basis was objectively unreasonable. *See* Matthew Bender & Co. v. West Publ'g Co., 240 F.3d 116, 122 (2d Cir. 2001) ("The imposition of a fee award

against a copyright holder with an objectively reasonable litigation position will generally not promote the purposes of the Copyright Act.").

As discovery progressed, other facts surfaced that legitimately prompted plaintiffs to pursue their claim. They obtained an expert opinion that the two songs were substantially similar; they learned-quite remarkably-that Crow delivered his song to an MGM executive (Sandoval) on the same day that Arnold delivered his song to Sandoval; they learned that Arnold could not produce a demo of the January 6, 1999 version of the song; and they learned of inconsistencies in Manson's and Arnold's recollections of when Manson first heard "The World Is Not Enough" and communicated her comments to Arnold. All told, this evidence gave plaintiffs objectively legitimate reasons for pursuing discovery in the case and for seeing the case through to summary judgment.

The two reasons given by the district court for awarding fees do not alter this conclusion. The court first noted that "Plaintiffs[']claims were objectively unreasonable in that Plaintiffs pursued litigation despite multiple third-party declarations establishing independent creation of ["The World Is Not Enough"] before any of the Defendants had access to Plaintiffs' original work." D. Ct. Op. at 8 (June 17, 2003). But the declarations contained several inconsistencies and all of them were submitted by individuals with a personal and professional stake in the answer to whether David Arnold copied a song that he represented as original. While those inconsistencies proved immaterial, plaintiffs were entitled to depose the individuals and

determine whether their recollections of the facts collectively made sense.

The second factor offered by the district court is no more persuasive: "Plaintiffs offered no direct evidence to support one of the two basic elements of copyright infringement." *Id.* at 8-9. This ambiguous reference points to one of two things. Either plaintiffs failed to produce direct evidence of copying or plaintiffs failed to provide evidence of access (they did provide an expert's opinion that the songs were substantially similar). As to the former explanation, direct evidence of *copying* is a rarity and accordingly the failure to provide such evidence by itself never supplies an independent basis for awarding attorneys' fees. *See* Ellis, 177 F.3d at 506 ("Direct evidence of copying is rare, so frequently the plaintiff will attempt to establish an inference of copying [with indirect evidence]."); *see also* Segrets, Inc. v. Gillman Knitwear Co., 207 F.3d 56, 61 (1st Cir. 2000); Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992); Narell v. Freeman, 872 F.2d 907, 910 (9th Cir. 1989).

As to the latter explanation, it was not until *after* the completion of discovery that the district court could have reached the conclusion that plaintiffs failed to provide evidence of access. *See* Williamson v. United States Dep't of Agric., 815 F.2d 368, 373 (5th Cir. 1987) ("If discovery could uncover one or more substantial fact issues, appellant was entitled to reasonable discovery to do so."). Prior to that, as noted, plaintiffs had several concerns that reasonably prompted them to continue discovery. Indeed, the most important depositions in the case--those of Arnold, Black, Manson and Hillis--took place approximately one month before

MGM filed its successful motion for summary judgment. Fogerty and Crow reasonably believed that these depositions might bear fruit, a conclusion that the district court apparently reached as well when it denied MGM's first motion for summary judgment and request for a stay of discovery, both of which were filed before plaintiffs took these depositions. D. Ct. Order (Jan. 20, 2002).

V.

For these reasons, we affirm the district court's grant of summary judgment and reverse its award of attorneys' fees.

Footnotes

* The Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

No. 3:01-0158
JUDGE HAYNES

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK P. FOGERTY and NATHAN CROW,
Plaintiffs,

v.

MGM GROUP HOLDINGS CORP., INC., d/b/a MGM UNIVERSAL MUSIC GROUP, INC., UNIVERSAL STUDIOS, INC., and EON PRODUCTIONS, LTD.,
Defendants.

ORDER

In accordance with the Memorandum filed herewith, Defendants' renewed motion for summary judgment (Docket Entry No. 64) is GRANTED. Plaintiff's claims against the Defendant are DISMISSED with prejudice. In addition, Plaintiffs motion to reopen discovery (Docket Entry No. 95) is DENIED as moot because there has been ample time for discovery on liability, see Celotex Corp. v. Catrett, 477 U.S. 317, 326, and any further discovery on damages is moot.

It is so ORDERED.

ENTERED this 13 day of March, 2003.

WILLIAM J. HAYES, JR.
United States District Judge

No. 3:01-0158
JUDGE HAYNES

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

FRANK P. FOGERTY and NATHAN CROW,
Plaintiffs,

v.

MGM GROUP HOLDINGS CORP., INC., d/b/a MGM UNIVERSAL MUSIC GROUP, INC., UNIVERSAL STUDIOS, INC., and EON PRODUCTIONS, LTD.,
Defendants.

MEMORANDUM

Plaintiffs, Frank P. Fogerty and Nathan Crow, filed this action for copyright infringement under 17 U.S.C. § 501 of the Copyright Act, 15 U.S.C. § 1125 of the Lanham Act and Tenn. Code Ann. § 47-18-104(b) of the Consumer Protection Act of 1977 against Defendants, MGM Group Holdings Corporation, Inc. ("MGM"), doing business as, MGM, Universal Music Group, Inc., Universal Studios, Inc. and Eon Productions, Ltd. The gravamen of Plaintiff's claim is that Defendants infringed Plaintiff s copyright by publicly performing and publishing portions of Plaintiffs original song, "This Game We Play," through the distribution and publication of the theme song "The World Is Not Enough" in the motion picture of the same title.

Before the Court is Defendant's renewed motion for summary judgment (Docket No. 64) for which oral argument was held February 21, 2003 (Docket No. 138). fn1

Defendant contends in sum that: (1) there are no genuine issues of material fact; (2) the composers of the allegedly infringing musical composition "The World Is Not Enough" ("TWINE"), created the work before Plaintiffs allegedly provided their musical composition, "This Game We Play" ("GAME"), to Defendants, therefore, TWINE was independently created; and (3) no evidence exists that the persons to whom Plaintiffs allege that they provided GAME ever furnished it to the creators of TWINE, therefore, neither Defendants nor TWINE's composers ever had access to GAME prior to completion of TWINE.

Plaintiff responds, in sum that: (1) there are material factual disputes over the completion date of TWINE; (2) that Defendants did have access to GAME through several channels; fn2 and (3) that even if the Court determined that Defendants did not have access to GAME, the two musical compositions are so "strikingly similar" that access is not needed to show infringement.

For the reasons set forth below, the Court concludes that there are no material factual disputes and that Defendant's renewed motion for summary judgment (Docket Entry No. 64) should be granted because Defendants have shown independent creation of TWINE prior to the date when any access by Defendants could have occurred.

A. Findings of Fact fn3

David Arnold is a writer of film scores and theme music. Arnold has written the scores for two James Bond films, "Tomorrow Never Dies" and "The World is Not Enough." (Docket Entry No. 67, Attachment thereto Arnold Dep. at 4-6).

In about 1996, Michael Wilson and Barbara Broccoli, the principals of Eon Productions ("Eon"), the entity owning the James Bond rights and the producers of the Bond films, hired Arnold to write the score and the end title theme for the James Bond film "Tomorrow Never Dies" ("TND"). Id. at 14. On the last day of recording the score for TND, Wilson told Arnold, "Make sure you're available in two years' time for the next one," referring to the next James Bond film. Id. at 20.

In August of 1998, Wilson and Broccoli informed Arnold that they were going to "give [him] a shot at writing the opening title" for the upcoming James Bond film (then referred to as "Bond XIX"), and in late summer informed him that the film title would be "The World Is Not Enough." Id. at 24. In the fall of 1998, Arnold enlisted Donald Black, to write lyrics, and the two began collaborating on the composition. Id. at 26-28. Black has been a professional songwriter for over forty years and has written the lyrics to the themes for four James Bond films in addition to TWINE. (Docket Entry No. 67, Attachment thereto Black Dep. at 6-7).

In his deposition, Black stated that Arnold called him in the fall of 1998 and told him he thought "there's a chance that we could have a go at writing the title song" for TWINE. Id. at 9. Black worked with Arnold

in November and December of 1998 on TWINE. Id. at 12-15. Black's day planner reflects several meetings with Arnold on November 11, 1998, November 12, 1998 and December 15, 1998. (Docket Entry No. 67, Attachment thereto Black Dep. at 12-15, Exs. 1, 2, 3).

During this composing process that took place in October OT November of 1998, Arnold played portions o£ TWINE for Trish Hillis, Arnold's assistant, over the telephone. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 31-32; Hillis Dep. at 8-9). On December 26, 1998, Arnold played the verses and the chorus of TWINE on the piano for Hillis at a celebration in his London home. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 33; Hillis Dep. at 1314).

Arnold rents a small studio room at Air Studios in London, England. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 105; Hillis Dep. at 37). In the second week of December 1998, Arnold played TWINE for Geoff Foster and Isobel Griffiths, two employees of Air Studios. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 37). In early January 1999, Arnold made a demonstration recording ("demo") of TWINE. Id. at 38. Arnold created the demo on his computer at Air Studios. Id. at 42-43. fn4

During December 1998 or the first week of January 1999, Wilson and Broccoli came to Air Studios and listened to TWINE. Id. at 41; Docket Entry No. 23, Wilson Decl. at ¶ 6; Docket Entry No. 19, Broccoli Decl. at ¶ 6. Wilson noted that the song "sounds just like our old ones," meaning earlier Bond themes. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 45). Wilson and Broccoli suggested that Arnold play the song for

Michael Apted, the director of the motion picture. Id. at 43. The next day, Arnold went to Pinewood Studios, the movie studio where the motion picture was to be filmed, and played the song for Apted. Id. at 44, 46.

On January 19, 1999, Arnold asked Hillis to find out how he could get a copy of the demo to Manson, the lead singer of the pop group "Garbage," who was his first choice to record TWINE and to whom he had previously mentioned his interest in her recording a Bond song. (Docket Entry No. 67, Attachment thereto Hillis Dep. at 21-22; Arnold Dep. at 51-52). Arnold suggested that she contact Manson's record company in the UK, Mushroom Records. (Docket Entry No. 67, Attachment thereto Hillis Dep. at 21). Hillis called Mushroom Records and spoke to a man named Ian Wesley ("Wez"). Id. Wez told her that Manson was staying at the Royal Garden Hotel, "and that 10 am would be a good time because Shirley would be in make up before she was having press and magazine interviews." Id. at 23. fn5 Wez told Hillis to deliver the demo to Garbage's tour manager, Harald Kohl. Id. at 25. Hillis called the Royal Garden Hotel for directions, and made an entry in her calendar for the next day- "10 am - D's song to Shirley Manson." Id. at 24-25, Ex. 4; Docket Entry No. 18, Attachment thereto Hillis Decl. at Ex. B. fn6

On January 20, 1999, Hillis picked up the demo from Air Studios, where Arnold had left it for her, and delivered it to the Royal Garden Hotel. (Docket Entry No. 67, Attachment thereto Hillis Dep. at 26). At the hotel, she called Kohl's room and told him that she had a package that Manson was expecting from Arnold. Id.

at 25. Kohl told her to leave it at the front desk, and she did. Id. at 25-26.

Shirley Manson, the artist who recorded TWINE, stated in her deposition that she received the demo of TWINE at the Royal Garden Hotel from Harald Kohl on January 20, 1999:

Q. Do you recall staying at the Royal Garden Hotel on January 20, [1999]?
A. Uh-huh. fn7

Q. Who is Wez?
A. Wez is our general manager of our record company for the rest of the world, excluding North America, based out of the UK.

Q. And who is Harold [sic] Kohl?
A. He was, at the time, our tour manager.

Q. In January of 1999?
A. That's correct.

Q. How did you actually physically receive a copy of the recording that you believe you listened to on the plane?
A. As I recall, Harold [sic] handed me a package.

Q. Do you recall whether you were -- whether he handed you this package while you were staying in the Royal Garden Hotel in January of 1999?
A. Yes.

Q. And, in fact, is that when the package was handed to you?

A. Yes.

(Docket Entry No. 67, Attachment thereto Manson Dep. at 54-55).

Manson stated that the melody of TWINE did not change from the demo recording to the commercially released recording:

Q. [by Mr. Blackburn] You said, then, that there were changes made during the recording itself.
A. That's correct.

Q. Can you just describe what you're referring to?
A. Different sounds and instrumentation.

Q. Were there any changes to melody?
A. Not that I can recall.

Q. Do you recall one way or another whether there were?
A. I don't think there was.

Id. at 17.

Arnold also sent a demo of TWINE by courier service on February 2, 1999, to Vasi Vangelos, Arnold's agent in Los Angeles, who passed it on to Michael Sandoval at MGM Studios. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 56). Hillis identified an invoice from Air Studios reflecting a charge for a courier service to Vangelos on February 2, 1999. (Docket Entry No. 67, Attachment thereto Hillis Dep. at 27-28, Ex. 6).

Plaintiff alleges that, prior to Sandoval receiving Arnold's demo, Sandoval spoke to Crow on the telephone on January 28, 1999 and agreed to a meeting on February 4, 1999. (Docket Entry No. 67, Attachment thereto Crow Dep. at 140-43). in his deposition, Sandoval did not remember the conversation or setting the meeting, but Sandoval stated that he had no reason to believe that the telephone call and the meeting did not take place. (Docket Entry No. 69, Sandoval Dep. at 66-70). In Crow's deposition, Crow stated that at the February 4, 1999 meeting with Sandoval Crow played a CD sampler of his original compositions, including GAME. (Docket Entry No. 67, Attachment thereto Crow Dep. at 142-43). Crow and Sandoval both stated that Sandoval told Crow that Arnold was already commissioned to write the score for TWINE, but that Sandoval would consider a ballad from Crow for another film "The Thomas Crown Affair" and that Crow should leave a copy of his songs with Sandoval. (Docket Entry No. 69, Sandoval Dep. at 71; Docket Entry No. 67, Attachment thereto Crow Dep. at 142-43).

Crow also asserts in his deposition that on February 5, 1999, Crow delivered a copy of GAME to Derek Alpert at Rondor Music. (Docket Entry No. 67, Attachment thereto Crow Dep. at 98). Alpert stated in his deposition that he did not recall receiving a demo from Crow, but that he had no reason to believe that he did not receive the demo. (Docket Entry No. 70, Alpert Dep. at 58, Ex. 1). Alpert's primary contact at MGM was Sandoval. ld. at 29. Alpert also stated in his deposition that because Sandoval was on Rondor's new product distribution list, Sandoval would receive music

that Rondor was trying to pitch automatically through the distribution list. Id. at 33-34.

Finally, Crow asserts in his deposition that after his meeting with Sandoval and learning that Arnold was working on the Bond film, Crow sent a copy of GAME to Arnold via Federal Express on or about February 14, 1999 in the hopes of collaborating with Arnold on TWINE. (Docket Entry No. 67, Attachment thereto Crow Dep. at 125-27). Crow sent GAME to Pinewood Studios where he understood Arnold would be coming to work on TWINE. Id. at 128. Crow stated in his deposition that he contacted Pinewood and acquired the name of the music department supervisor who received deliveries and addressed the package to the supervisor. Id. Arnold was listed as the secondary contact. Id.

In Hillis's deposition, Hillis stated that it is Arnold's practice to return unsolicited submissions unheard. (Docket Entry No. 67, Attachment thereto Hillis Dep. at 28-29). Arnold stated that he never received a Federal Express package from Crow at Pinewood or had any communications with Fogerty or Crow. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 62-63).

Defendants assert that Arnold never heard GAME before the inception of this lawsuit. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 62, 65-66). In addition, Defendants assert that Arnold had never heard of or communicated with Alpert before this lawsuit, and that he never received any songs from either Alpert or Sandoval. Id. at 62. In their depositions, Alpert and Sandoval state that they never provided GAME to Black, Arnold, or anyone else.

(Docket Entry No. 69, Sandoval Dep. at 78-80; Docket Entry No. 70, Alpert Dep. at 36).

Arnold, in his deposition, explained that there were similarities between GAME and TWINE and stated that "my third, fourth and fifth notes, the opening stanza of The World Is Not Enough is identical to the first, second, third and fourth notes of the song called This Game We Play." (Docket Entry No. 67, Attachment thereto Arnold Dep. at 64). Crow stated that: the principal melody, the principal 4-note melody, at the basis of This Game We Play are the same notes, the same key, the same rhythm as the same principal notes in The World Is Not Enough... The actual notes, the way the notes are used rhythmically in the phrase, and the key, are, in both cases, exactly the same.

(Docket Entry No. 67, Attachment thereto Crow Dep. at 145).

Plaintiff's expert, Judith Finell, a musicologist, explained that:

From a musical perspective, due to the high degree of similarity between these songs both quantitatively and qualitatively, a claim of copyright infringement on the part of the owners of "Game" against the owners of "World" would be valid and supportable.

(Docket Entry No. 82, Finell's Affidavit, App. at 1).

Between December 9, 1998, when Crow and Fogerty created GAME, and December 3, 1999, the Plaintiffs secured the copyright to GAME and received from the Register of Copyrights a Certificate of Registration,

dated and identified as "December 3, 1999, Class Pau, No. 2-455-793." (Docket Entry No. 67, Attachment thereto Crow Dep. at 78; Docket Entry No. 68, Fogerty Dep. at 56).

B. Conclusions of Law

"The very reason of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on Rule 56, Federal Civil Judicial Procedure and Rules (West Ed. 1989). Moreover, "district courts are widely acknowledged to possess the power to enter summary judgment sua sponte, so long as the opposing party was on notice that she had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Accord, Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the United States Supreme Court explained the nature of a motion for summary judgment:

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will

not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

As to materiality, the substantive law will identify, which facts are material. Only disputes over facts that might ht affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

477 U.S. at 247-48 (emphasis in the original and added in part). Earlier the Supreme Court defined a material fact for Rule 56 purposes as "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citations omitted).

A motion for summary judgment is to be considered after adequate time for discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where there has been a reasonable opportunity for discovery, the party opposing the motion must make an affirmative showing of the need for additional discovery after the filing of a motion for summary judgment. Emmons v. McLaughlin, 874 F.2d 351, 355-57 (6th Cir. 1989). But see Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989).

There is a certain framework in considering a summary judgment motion as to the required showing of the respective parties as described by the Court in Celotex

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. . . . [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.

Celotex, 477 U.S. at 323 (emphasis deleted).

As the Court of Appeals explained, "[t]he moving party bears the burden of satisfying Rule 56(c) standards." Martin v. Kelley, 803 F.2d 236, 239, n. 4 (6th Cir. 1986). The moving party's burden is to show "clearly and convincingly" the absence of any genuine issues of material fact. Sims v. Memphis Processors, Inc., 926 F.2d 524, 526 (6th Cir. 1991)(quoting Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986)). "So long as the movant has met its initial burden of demonstrating the absence of a genuine issue of material fact,' the nomnoving party then 'must set forth specific facts showing that there is a genuine issue for trial.'" Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989) (quoting Celotex and Rule 56(e)).

Once the moving party meets its initial burden, the Court of Appeals warned that "[t]he respondent must adduce more than a scintilla of evidence to overcome the motion [and]. . . must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Street v. J.C. Bradford & Co.,

886 F.2d 1472, 1479 (6th Cir. 1989)(quoting Liberty Lobby). Moreover, the Court of Appeals explained that

> The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.'

Street, 886 F.2d at 1480 (cites omitted). See also Hutt v. Gibson Fiber Glass Products, No. 895731 (6th Cir. filed September 19, 1990) ("A court deciding a motion for summary judgment must determine 'whether the evidence presents a sufficient disagreement to require a submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." quoting Liberty Lobby)).

If both parties make their respective showings, the Court then determines if the material factual dispute is genuine, applying the governing law.

> More important for present purposes, summary judgment will not lie if the dispute about a material fact is 'genuine' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving-party.

* * *

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict

necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'

Liberty Lobby, 477 U.S. at 248, 252, 106 S. Ct. 2505, 91 L.Ed.2d at 211-212, 214 (citation omitted and emphasis added).

It is likewise true that:

[I]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the patty opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. It has been stated that: 'The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to

determine whether there is any genuine issue of material fact in dispute. . . .'

Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427 (6th Cir. 1962) (citation omitted). As the Court of Appeals stated, "[a]ll facts and inferences to be drawn therefrom trust be read in a light most favorable to the party opposing the motion." Duchon v. Cajon Company, 791 F.2d. 43, 46 (6th Cir. 1986) app. 840 F.2d 16 (6th Cir. 1988) (unpublished opinion) (citation omitted).

The Court of Appeals further explained the District Court's role in evaluating the proof on a summary judgment motion

A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. Rule 56 contemplates a limited marshalling of evidence by the nonmoving party sufficient to establishing a genuine issue of material fact for trial. This marshalling of evidence, however, does not require the nonmoving party to "designate" facts by citing specific page numbers. Designate means simply "to point out the location of." Webster's Third New InterNational Dictionary (1986).

Of course, the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the nonmoving party relies; but that need for specificity must be balanced against a party's need to be fairly apprised of how much specificity the district court

requires. This notice can be adequately accomplished through a local court rule or a pretrial order.

InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989) cert. denied 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990). Here, the parties have given some references to the proof upon which they rely. Local Rule 8(b)(7)(A) and (C) require a showing of undisputed and disputed facts.

In Street, the Court of Appeals discussed the trilogy of leading Supreme Court decisions, and other authorities on summary judgment and synthesized ten rules in the "new era" on summary judgment motions

1. Complex cases are not necessarily inappropriate for summary judgment.

2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.

3. The movant must meet the initial burden of showing 'the absence of a genuine issue of material fact' as to an essential element of the non-movant's case.

4. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion Or a directed verdict motion is the same: 'whether the evidence presents a sufficient disagreement to require

submission to a jury or whether it is so one-sided that the party must prevail as a matter of law.'

6. As on federal directed verdict motions, the 'scintilla rule' applies, i.e., the respondent must adduce more than a scintilla of evidence to overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

10. The trial court has more discretion than in the 'old era' in evaluating the respondent's evidence. The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is implausible.

Street, 886 F.2d at 1479-80.

The Court has distilled from these collective holdings four issues that are to be addressed upon a motion for summary judgment: (1) has the moving party "clearly and convincingly" established the absence of material facts?; (2) if so, does the plaintiff present sufficient facts to establish all the elements of the asserted claim or defense?; (3) if factual support is presented by the nonmoving party, are those facts sufficiently plausible to support a jury verdict or judgment under the applicable law?; and (4) are there any genuine factual issues with respect to those material facts under the governing law? With these legal principles in mind, the Court addresses the legal standards governing the claims in this action.

To establish a claim for copyright infringement, a plaintiff must prove two elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publ'ns., Inc v. Rural Tel. Servs., Inc., 499 U.S. 340, 361 (1991). Plaintiffs ownership of a copyright to GAME is undisputed. Therefore, Plaintiffs have satisfied the first prong of a copyright infringement action. See McKinley v. Raye, 1998 U.S. Dist. LEXIS 3019 (N.D. Tex. 1998) (Defendants' failure to contest Plaintiff's ownership of the copyright satisfied the first prong of the copyright infringement action). Therefore, the question before this Court in deciding the Defendants' motion for summary judgment is whether Defendants copied constituent elements of Plaintiffs' musical composition that are original.

In the absence of direct evidence of duplication, "the copyright holder frequently proves copying by showing that the defendant or the person who composed the defendant's work had access to the copyrighted material and that the defendant's work is substantially similar to the protected work." Robert R. Jones Assocs. v. Nino Homes, 858 F.2d 274, 276-77 (6th Cir. 1988).

Access is essentially "heating or having a reasonable opportunity to hear the plaintiff['s] work and thus having the opportunity to copy." Tree Publ'g Co. v. Warner Bros. Records 785 F.Supp. 1272, 1274 (M.D.Tenn. 1991); see also 4 NIMMER §§ 13.02[A]. Although "evidence that a third party with whom both the plaintiff and defendant were concurrently dealing had possession of plaintiffs work is sufficient to establish access by the defendant," "[a]ecess may not be inferred through mere speculation or conjecture." 4 NIMMER §§ 13.02[A] (citations omitted); Ellis v. Diffie, 177 F.3d 503, 506-07 (6th Cir. 1999). In a copyright infringement lawsuit, the plaintiff has the burden of presenting "significant, affirmative and probative" evidence to support a claim of access. Tisi v. Patrick, 97 F.Supp.2d 539, 547 (S.D.N.Y. 2000). A plaintiff must demonstrate a "reasonable possibility of access," and a "bare possibility (which would amount to no more than conjecture)" is insufficient. Eaton v. Nat'l Broadcasting Corp., 972 F. Supp. 1019, 1023 (E.D. Va. 1997); Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 944 (8th Cir. 1992). If access can be proved, an inference of copying is rebuttable by evidence of independent creation of the allegedly infringing work. Ellis, 177 F.3d at 507; Intersong-USA v. CBS Inc., 757 F.Supp. 274, 282 (S.D.N.Y. 1991).

Plaintiffs postulate three theories by which the writers of TWINE allegedly gained access to GAME:

1) Crow left a tape of GAME with Alpert, an executive at Rondor Music, on February 5, 1999;

2) Crow left a tape of GAME with Sandoval at MGM Studios, on February 4,1999; and

3) Crow sent an unsolicited recording of GAME to Pinewood Studios in London via Federal Express on February 14, 1999.

(Docket Entry No. 67, Attachment thereto Crow Dep. at 125).

The Court concludes that Defendants and the composers of TWINE did not have access to GAME though any of the avenues postulated by Plaintiffs because a review of the record indicates that the melody and significant portions of the TWINE composition at issue were completed prior to the dates that any alleged access by Defendants to GAME could have occurred.

Manson stated that she received the recording of TWINE during a stay at the Royal Garden Hotel in London on or around January 20, 1999. (Docket Entry No. 67, Attachment thereto Manson Dep. at 54-55). This is supported by the deposition testimony of Hillis who stated in detail that she picked up the recording from Arnold at Air Studios and delivered it to Harald Kohl via the front desk at the Royal Garden Hotel on January 20, 1999. (Docket Entry No. 67, Attachment thereto Hillis Dep. 25-26). Manson further stated that

there were no changes in the melody of TWINE made between her receipt of the initial recording and the final recorded version that she sang, although there were some changes to the "sounds and instrumentation." (Docket Entry No. 67, Attachment thereto Manson Dep. at 17).

Although Plaintiff focuses on Manson's minor inconsistencies in when she first listened to the recording, these inconsistencies are irrelevant because the recording was delivered on January 20, 1999 and remained unchanged between the time of delivery and whenever Manson listened to the recording. Manson's testimony therefore indicates that TWINE and its melody had been composed and recorded at least as early as January 20, 1999, which was several days before the Defendants had any alleged access to GAMF. This conclusion is additionally supported by the declarations of Wilson and Broccoli who both stated they heard the demo during December of 1998 or the first week of January 1999. (Docket Entry No. 23, Wilson Decl. at ¶ 6, Docket Entry No. 19, Broccoli Decl. at ¶ 6). The changes made to TWINE between the demo recording and the final recorded version by Manson were (1) two lines of lyrics and (2) the excision of a three note motif which was thought to be too similar to the Bond music from TND. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 57-59, Manson Dep. at 19).

To refute these statements, Plaintiff focuses on letters sent by Hillis in returning unsolicited materials to individuals who seat demos relating to the Bond project. (Docket Entry No. 67, Attachment thereto Hillis Dep. at 43-49, fix. 6). Plaintiff asserts that in these

letters, Hillis states that TWINE was not completed until sometime between February 23, 1999 and April 10, 1999, which Plaintiff argues would have provided Defendants access to GAME before the completion of TWINE. Id. at 47.

The Court does not agree. These letters make reference to the score as a whole and not specifically to the theme song, TWINE. Because the references are to the score in general and not the theme song specifically, they do not create an inconsistency or material factual dispute. As stated supra, two primary changes were made to TWINE after the original demo, thus, even if the references were to TWINE specifically, they did not necessarily refer to the melody which is the part of the musical composition in dispute. The deposition testimony of Manson noted that the melody was in fact finished on or about January 20, 1999 and Manson could not recall any changes made to the melody after that point. (Docket Entry No. 67, Attachment thereto Manson Dep. at 17). Therefore, this Court concludes that Defendants and TWINE's composers did not have access to GAME before the completion of TWINE, and Defendants have demonstrated independent creation.

In the alternative, Plaintiffs allege infringement under the doctrine of "striking similarity." In the Sixth Circuit, the "striking similarity" doctrine dispenses with the need for access only "[w]hen the similarity between two works is so striking that there is no plausible possibility of independent creation[.]" Trapani v. CBS Records. Inc. 1988 WL 92438, at *6-7 (Sept. 2, 1988) (citations omitted and emphasis added). This doctrine is limited, however, "to complex or sophisticated subject matter where independent

creation would be exceptionally unlikely." Id. A plaintiff must demonstrate that the alleged "striking" similarities are "the sort of similarities that cannot satisfactorily be accounted for by a theory of coincidence, independent creation, prior common source, or any theory other than that of copying." Selle v. Gibb, 741 F.2d 896, 904 (7th Cir. 1984). Here, the Plaintiffs have not made a sufficient showing to demonstrate striking similarity.

As stated previously, Arnold, in his deposition, explained that there were similarities between GAME and TWINE and stated that "my third, fourth and fifth notes, the opening stanza of The World Is Not Enough is identical to the first, second, third and fourth notes of the song called This Game We Play" (Docket Entry No. 67, Attachment thereto Arnold Dep. at 64). Plaintiffs expert, Judith Finell, a musicologist, noted that in her expert opinion the two compositions are "substantially similar in both pitch and rhythm." In particular, Finell noted that the musical "hook" is essentially the same:

Both use the same series of scale degrees, 5-2-1-5, with very similar rhythms. In both songs, the hook occurs as the first phrase of its section, thus functioning as a greeting.

(Docket Entry No. 82, Finell Affidavit ¶ 4).

There is no evidence adduced by Plaintiffs to support the proposition that the two works are so strikingly similar that copying is the only plausible explanation of the similarities. Arnold has testified that lie has previously used the same melodic device (a four note sequence) at issue in this case in other works which he

wrote years prior to Plaintiffs' creation of GAME, including "Tomorrow Never Dies," "Young Americans," and "Godzilla." (Docket Entry No. 67, Attachment thereto Arnold Depo. at 84). Arnold testified that "the actual figure 5-2-1-5 [the allegedly infringing musical device (see Finell Aff. at ¶ 4a)] is in The Young Americans very prominently." Id. at 86. There is no evidence in the record to contradict this testimony.

Plaintiffs' expert musicologist, who has testified in similar cases, concludes only that a claim for infringement "would be valid and supportable." (Docket Entry No. 82, Finell Aff. ¶14). The Court notes that Finell does not opine that the compositions are "strikingly similar," or that the only explanation for the similarity is copying. See Finell Aff. There is no basis in the record to support Plaintiffs' contention that the two compositions are so strikingly similar that the only explanation for the similarity is that TWINE's composers copied the melody from GAME. See Darrell v. Joe Morris Music Co., 113 F.2d 80 (2nd Cir. 1940) ("simple, trite themes . . . are likely to recur spontaneously"); Trapani , 1988 WL 92438 at *3 (noting that the doctrine of striking similarity "would not apply in a case. . . involving two tunes that have few distinctive features and are alike mainly in their banality.").

As the Plaintiff points out, substantial similarity is a question of fact for a jury. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1166 (9th Cir. 1977). Here, there is no factual dispute that the two compositions are substantially similar, see Docket Entry No. 67, Attachment thereto

Arnold Dep. at 64; Docket Entry No. 67, Attachment thereto Crow Dep. at 145, but Plaintiffs have not shown a "striking similarity" that would overcome the proof of independent creation, as discussed supra. To deny the Defendants' motion for summary judgment on the grounds of striking similarity, this Court would have to discredit the deposition testimony, taken under oath, of Manson and Hillis as well as Arnold and Black and discredit the declarations, also taken under oath, of Wilson and Broccoli.

"Absent specific facts discrediting testimony from a witness associated with the movant, and absent a direct conflict in the testimony, the opponent ... is not entitled to have the defendant's evidence positively disbelieved." Grubb, 88 F.3d at 4. The survival of Plaintiffs' case requires the Court to disbelieve positively the sworn testimony of witnesses associated with Defendants despite the absence of facts to discredit this testimony. fn8 After a motion for summary judgment is filed, "[p]laintiff cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a. disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." Barnhart v. Pickrel, Schaeffer & Ebling Co., 12 F.3d 1382. 1389 (6th Cir. 1993). Therefore, the Court concludes that Plaintiffs are not entitled to have these witnesses "positively disbelieved" and Defendants are entitled to summary judgment.

For the reasons set forth above, the Court concludes that the Defendants' renewed motion for summary judgment (Docket Entry No. 64) should be granted.

(Docket Entry No. 67, Attachment thereto Crow Depo. at 179-80).

An appropriate Order is filed herewith.

Entered this the 13th day of March, 2003.

WILLIAM J. HAYES, JR.
United States District Judge

Footnotes

fn1 Defendants had previously moved this Court for summary judgment on September 14, 2001. (Docket Entry No. 15). Upon Plaintiff s motion (Docket Entry No. 27), the Court extended Plaintiff's time for response to Defendant's motion for summary judgment to twenty (20) days after the close of discovery. (Docket Entry No. 32). On January 30, 2002, the Court granted Defendants permission to renew their motion for summary judgment (Docket Entry No. 55) by the deadline for dispositive motions set forth in the Case Management Order (Docket Entry No. 10).

fn2 As discussed infra, Plaintiffs allege that Defendants had access to GAME through TWINE's, David Arnold, via Michael Sandoval at MGM, Derek Alpert at Rondor Records and Shirley Manson of Garbage.

fn3 Upon a motion for summary judgment, the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. Duchon v. Cajon Co., 791 f. 2d 43, 46 (6th Cir. 1986) app. 840 f. 2d 16 (6th Cir. 1988) (unpublished opinion). As

will be discussed infra, under recent Supreme Court holdings, upon the filing of a motion for summary judgment, the opposing party must come forth with sufficient evidence to withstand a motion for directed verdict, Anderson v. Liberty Lobby , 477 U.S. 242, 247-52, 106 S.Ct. 2502. 91 L.Ed.2d 202 (1986), particularly where there has been an opportunity for discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 276 (1986). The Court concludes that under the applicable law there are not any material factual disputes. Thus, this section constitutes findings of fact under Fed.R.Civ.P. 56(d).

fn4 Arnold testified that in researching the date of creation of the demo, he found that his computer listed January 6, 1999, as the date on which the demo was last modified. (Docket Entry No. 67, Attachment thereto Arnold Dep. at 108).

fn5 In support of their initial Motion for Summary Judgment. Defendants submitted Garbage's itinerary and credit card receipts demonstrating that Manson was at the Royal Garden Hotel on January 20, 1999. See Docket Entry No. 18, Attachment thereto India England Decl., Ex. A; Docket Entry No. 21 Maryann McCready Decl., Ex. A). Moreover, Plaintiffs expressly do not dispute Manson's presence at that hotel on January 20, 1999. (Docket Entry No. 67, Attachment thereto Manson Dep. at 54).

fn6 Hillis's telephone calls to Wez and to the Royal Garden Hotel are contained in a telephone log she maintains of her ingoing and outgoing telephone calls. (Docket Entry No. 67, Attachment thereto Hillis Dep.

at 2223; Docket Entry No. 18, Attachment thereto Hillis Decl. at Ex. C).

fn7 Manson reviewed her itinerary from the time period to refresh her recollection regarding the precise date. (Docket Entry No. 67, Attachment thereto Manson Dep. at 53-54).

fn8 Crow's deposition is illustrative:

Q. If I tell you that Ms. Manson testified that the received a copy of The World Is Not Enough on January 20, 1999 do you believe she's lying?
A. Yes.

Q. If Ms. Hillis testified that she delivered to Ms Manson's hotel on January 19th or 20th a copy of The World Is Not Enough, do you believe Ms. Hillis is lying?
A. I do. I have no reason to believe that Ms Manson would have lied in the context of this conversation [her tape-recorded conversation with Crow], or would have any reason to.

Q. If the Broccoli/Wilsons maintain that they heard The World Is Not Enough in early January of 1999, are they lying?
A. They have a very strong motivation to lie. I would say, yes, absolutely. The film has made almost 700 million dollars.

Q. Is Derek Alpert lying if he testifies that he did out pass along a copy of This Game We Play to anyone who participated in the creation of The World Is Not Enough?

A. I'm not sure that Derek Alpert would be lying if he said that.

Q. Would Mr. Sandoval be lying if he testified that lie did not pass along a copy of This Game We Play to anyone involved with the creation of the musical composition The World Is Not Enough?
A. I think Mr. Sandoval would either be lying or be mistaken if he made that statement, yes.

Q. Do you believe that Mr. Arnold is lying about when he created the musical composition The World Is Not Enough?
A. Absolutely.